IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'H', MUMBAI

BEFORE SHRI R V EASWAR, PRESIDENT AND
SHRI P M JAGTAP, ACCOUNTANT MEMBER

I T A No: 6459/Mum/2009
(Assessment Year: 2005-06)

Tata Services Ltd., Mumbai (PAN: AAACT3991J)	…	Appellant
Vs		
Assistant Commissioner of Income Tax – 2(3) Mumbai	…	Respondent

Assessee by: Mr Burzis S Taraporevala
Revenue by: Mr Goli Sriniwas Rao

Date of Hearing: 6th September 2011

Date of Pronouncement: 9th September 2011

O R D E R

R V EASWAR, PRESIDENT:

This appeal by the assessee is directed against the disallowance of ₹30,11,135/- made under section 43B(f) of the Income Tax Act, 1961.

2. The assessee is a company and we are concerned with the assessment year 2005-06. In the return filed by the assessee, it made a disallowance of ₹30,11,135/- being provision for leave encashment. However, in the course of the assessment proceedings it contended that in view of the judgment of the Calcutta High Court in the case of Exide Industries & Another Vs. Union of India (2007) 292 ITR 470 (Cal), the provision should be allowed as a deduction. It may be mentioned herein that in the

aforesaid decision, section 43B(f) was struck down as being arbitrary, unconscionable and de hors the Supreme Court judgment in the case of Bharat Earth Movers vs. CIT (2000) 245 ITR 428 (SC). The AO however did not accept the assessee's claim that the provision should be allowed as a deduction and accordingly, while computing the total income, disallowed and added back the same.

3. The assessee's appeal against the disallowance of the provision was dismissed by the CIT(A) following his predecessor's orders for the assessment years 2003-04 and 2004-05. Hence, the present appeal.

4. At the time of the hearing before us, the learned representative for the assessee fairly drew our attention to the order of the Supreme Court made on 8th September 2008, by which the judgment of the Calcutta High Court (supra) was stayed until further orders. Our attention was also drawn to the order of the Supreme Court passed on 8th May 2009, in which it was made clear that the assessee would, during the pendency of the Civil Appeal, pay tax as if section 43B(f) was on the Statute Book, but at the same time it would be entitled to make a claim (for deduction) in the returns. There was no modification of the stay of operation of the judgment of the Calcutta High Court. In view thereof, it seems to us that the assessment has to be made as if section 43B(f) remained in the Statute Book as a valid provision. It is not disputed that if the section is constitutionally valid, the disallowance of the provision would be correct. Since the judgment of the Calcutta High Court

(supra) has been stayed, we have to hold that the disallowance has been rightly made by the departmental authorities. We accordingly confirm the disallowance. The appeal is dismissed with no order as to costs.

Order pronounced in the Open Court on 9th September 2011.

Sd/-	Sd/-
(P M Jagtap) Accountant Member	(R V Easwar) President

Mumbai, Dated 9th September 2011
saldanha

copy to:

1. Tata Services Ltd.
   Bombay House, 24, Homi Mody Street,
   Fort, Mumbai 400 001
2. ACIT 2(3), Mumbai
3. CIT-2, Mumbai
4. CIT(A)-6, Mumbai
5. DR “H” Bench

TRUE COPY BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI